Lower Merion School District

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November 14, 2005

Federal Communications Commission
Office of the Secretary
445 - 12th Street, SW
Washington, DC 20554

Re: Request for Review of Decision of Universal Service Administrator,
CC Docket No.02-6

Applicant Name:	Lower Merion School District
Billed Entity Number:	126079
Form 471 Application No.:	421434
Funding Request Number:	11177673
Original FCDL Letter Date:	May 24, 2005
SLD Appeal Decision Date:	September 12, 2005

REQUEST FOR REVIEW

Introduction and Procedural History

The Lower Merion School District ("District" or "Applicant) appeals from the SLD's denial of funding approval for a Funding Request associated lit fiber service applied for during FY 2004. This service previously had been a dark fiber service contract when the parties executed the original contract. Pursuant to the FCC's Third Report and Order and Second Further Proposed Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 03-323 (Order Released December 23, 2003) at n. 155 ("Third Report and Order"), the parties amended the agreement via a minor contract modification and bill of sale to become a lit fiber wide area network service.

In submitting its FY 2005 Form 471 application # 421434, the District's Item 21 attachment described the services contained in the FRN as a Gigabit Ethernet Wide Area Network Service between the District's high school and other schools. The District also submitted the ***original*** dark fiber contract and inadvertently failed to also include the minor contract modification which was executed on January 19, 2004 by Sunesys and on January 22, 2004 by the District. Based on the District's submission of the original dark fiber contract, the SLD denied the FRN on the basis that the service was ineligible dark fiber service pursuant to a Funding Commitment Decisions Letter ("FCDL") dated May 24, 2005.

The District and service provider, Sunesys, Inc. ("Sunesys" or "Service Provider") submitted a timely appeal on June 15, 2005, which documented and explained that the FRN was in fact for eligible lit fiber wide area network service. The Administrator, however, refused to consider this clarifying information stating, "program rules do not permit the SLD to accept new information on appeal except where an applicant was not given an opportunity to provide information during the initial review or an error was made by the SLD."

Reasons In Support Of This Appeal

1. The Administrator Incorrectly Concluded That Program Rules Do Not Permit the SLD From Accepting New Information On Appeal Except Where An Applicant Was Not Given An Opportunity To Provide Information During The Initial Review Or An Error Was Made By The SLD.

The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) uses its own guidelines, and not FCC-promulgated rules, for reviewing appeals. *See* http://www.sl.universalservice.org/reference/AppealsSLDGuidelines.asp ("The Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) reviews appeals of its decisions in accordance with guidelines established by the Schools and Libraries Programmatic Subcommittee of the USAC Board of Directors.")

Nevertheless, the Administrator incorrectly asserted in its decision on appeal that *FCC rules* prohibited the Administrator from considering new information submitted on appeal except under certain circumstances. In fact, this so-called program rule is *not* a regulation adopted by the FCC. Rather, it is a guideline that the SLD adopted: "Consistent with these guidelines, the SLD will not accept new information on appeal that is inconsistent with information in the file used during review." The FCC regulations governing the Administrator's processing of appeals are *silent* as to the standards that the Administrator shall apply in reviewing requests for reviews (appeals) of decisions.

The difference between FCC rules and regulations, and Guidelines posted by the Administrator to its web site, is a very important substantive distinction. USAC does not have authority to establish program rules – only the FCC has this authority. The Administrator's appeal guidelines do not constitute program *rules* since these appeal guidelines were not promulgated by the FCC pursuant to the Administrative Procedures Act and are not found in the Code of Federal Regulations. Indeed, the FCC regulations governing the universal service support mechanisms including E-rate expressly prohibit the Administrator from making policy.

Consequently, the Administrator erred in its appeal denial letter by program rules limited its consideration of new information on appeal.

Consequently, this self-imposed restriction that the Administrator has imposed on its review of new information on appeals has no basis in FCC regulations and should not be used as a reason to excuse the Administrator from examining the merits of appeals.

2. The FCC Is Not Bound By SLD's Appeal Guidelines, And 47 C.F.R. Section 54.723(a) And (b) Mandate That The FCC Must Use A *De Novo* Standard of Review For Evaluating The Merits of This Appeal.

The FCC is duty bound to consider the merits of this appeal on a de novo basis, according to 47 C.F.R. §54.723(a) and (b). This means that the FCC must conduct its own independent examination of the facts and record and draw its own conclusion as to whether discounts were properly denied for this FRN.

3. The Applicant and Service Provider Promptly Followed The FCC's Requirements And Amended Their Agreement To Comply With The FCC's Third Report And Order.

In editions of the Eligible Services Lists prior to the October 10, 2003 Eligible Services List ("ESL"), dark fiber service had been designated as an E-rate eligible service. With the October 10, 2003 edition of the ESL, this eligibility designation was rescinded. Beginning with the October 10, 2003 ESL, all interested stakeholders were put on notice that dark fiber service was no longer eligible for E-rate discounts.

In the Third Report and Order, the FCC acknowledged the October 10, 2003 ESL language concerning dark fiber service, and affirmed this determination:

> In order to receive support for services using lit fiber as a Priority One service, the school or library must purchase a functioning service from either a telecommunications service provider or internet access provider, which in turn is responsible for ensuring that both the fiber and the equipment to light the fiber are provided.[155]

Id. at ¶76. Footnote 155 was critically important to the many applicants and service providers, including the Lower Merion School District and Sunesys, which previously executed multi-year agreements for dark fiber service prior to October 10, 2003. There, the FCC made clear that parties could use a "minor contract modification" under which an applicant could transfer ownership of the equipment needed to light the dark fiber to the service provider and convert the agreement to a lit fiber agreement pursuant to a minor contract modification.

The FCC stated:

> In cases in which a school or library has previously purchased equipment to light fiber, such equipment may be traded-in to the service provider and leased back by the applicant. The applicant may not use the credit for the trade-in to pay its non-discounted portion of the services. Such a contract modification would be deemed a minor contract modification under section 54.500(g) of the Commission's rules if this was within the scope of the original contract and the change has no effect or negligible effect on price, quantity, quality, or delivery under the original contract. For instance, such a change could fit within the minor contract modification rule if the original contract was for the provision of high bandwidth transmission capability.

Id. at n. 155.

The District and Sunesys followed this precise procedure outlined in footnote 155 of the Third Report and Order. Pursuant to a bill of sale and minor contract modification executed in January of 2004 – before the District submitted its Form 471 application – the parties converted the dark fiber agreement into a lit fiber wide area network agreement.

The Item 21 attachment that the District submitted to the SLD was consistent with this minor contract modification and bill of sale. The invoice documentation, however, from the prior year which preceded the minor contract modification referred to the service as dark fiber service – which it was at the time since the invoice was issued pursuant to the parties' original agreement and before the release of the October 10, 2003 ESL and the Third Report and Order.

The District, however, only submitted the *original* dark fiber contract and invoices from 2003, and did not submit the minor contract modification to the SLD. This is because the District did not know that it had to submit the minor contract modification in support of the Item 21 attachment since the attachment description expressly stated "gigabit Ethernet wide area network service." The District submitted the documentation which matched the

Based on its review of the original agreement between the parties, the SLD concluded that the agreement covered ineligible dark fiber service and denied the FRN.

In its appeal of the FCDL's denial of this FRN, the District and Sunesys explained that while the 2003 invoice submitted in support of the FRN was for dark fiber service, the parties since had amended the agreement to cover lit fiber service in accordance with the Third Report and Order and submitted this additional documentation. Nonetheless, the SLD rejected this additional information without considering it on the merits, mistakenly contending that "program rules" stood in the way of the SLD's examination of this additional information.

The SLD mistakenly applied its own appeal guidelines in deciding not to consider the minor contract modification and bill of sale. The appeals guidelines state that appeals will be granted by USAC (assuming there are no other issued identified during review) when, among other reasons:

3. When the appeal provides documentation to correct an incorrect SLD assumption made because there was insufficient information in the application file about an issue. In general, PIA will contact the applicant and ask for all information necessary to make decisions about an application. If that contact does not occur, however, and funding is denied based on an incorrect assumption, the SLD will grant an appeal when the appellant points out the incorrect assumption and provides documentation about the issue that is consistent with information originally provided but also successfully resolves the ambiguity in the original file.

The FCC has stated that the SLD's appeal procedures should consider new documentation provided with an applicant's appeal to demonstrate than an ambiguous issue should be resolved in the applicant's favor if the new information is consistent with the information originally provided." *Request for Review of the Decision of the Universal Service Administrator by Pope Blanche Elementary School*, File No. SLD-200168, CC Docket Nos. 96-45, 97-21 (November 21, 2001).

The SLD made three incorrect assumptions (and interpretations of ambiguities) in reviewing this FRN. First, SLD assumed that the invoice submitted for 2003 in support of the FRN was for prospective dark fiber service for the FY 2004 period, even though the District's Item 21 attachment stated that the service was for Gigabit Ethernet wide area network service, and stated nothing about dark fiber service.

Second, PIA did not specifically ask the applicant to clarify whether the FRN was for dark or lit fiber service and therefore, the District did not have an opportunity to clarify the incorrect assumption.[1]

Third, the SLD did not ask the applicant to explain why the contract that the applicant submitted had a contract award date of January 16, 2001 listed on this FRN, even though the allowable contract date for the form 470 that the District cited was January 20, 2004. In fact, the District has cited in an incorrect form 470 # in support of this FRN, and should have cited to the form 470 from FY 2000 which was the enabling form 470 for the parties' original agreement. This form 470 # is 660340000329300 and was provided to the SLD on appeal – but was ignored by the SLD.

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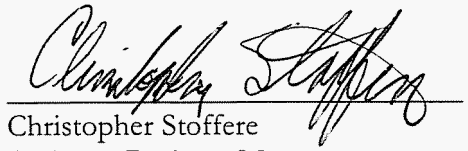
[1] See Shawano-Gresham School District Appeal, File No. SLD-282913, DA 04-308 (Order released February 4, 2004), in which the FCC reversed and remanded the SLD's denial of funding on the incorrect basis that the service was for electric charges and not for fiber optic transmission service. The FCC specifically found that SLD should have considered the additional information submitted in support of the appeal because of an ambiguity in earlier information. The earlier information included an invoice for fiber optics which was at odds with a description of service as "electric charges." This case is analogous to the ambiguity in the instant appeal because the District's documentation in Item 21 stated that the service was for Gigabit Ethernet Service and not dark fiber, whereas the invoice and contract stated it was for dark fiber service. The contract addendum which is the new information that the applicant seeks to have considered at this time makes clear that the Gigabit Ethernet Service is for lit fiber and not dark fiber service. Indeed, but for the inclusion of the electronics for lighting the fiber, there would have been no reason to describe the bandwidth capability of the service as being gigabit Ethernet WAN service. Rather the service would have simply been described as dark fiber service.

Given the confusion over the rescission of the eligibility of dark fiber service with the issuance of the October 10, 2003 ESL, the SLD's review of this FRN should have been particularly detailed so as to explicitly confirm whether a minor contract modification – as permitted by the Third Report and Order – had been executed by the parties. If SLD had asked the direct question, then all of this confusion would have been avoided and the District would have provided the requested documentation.

Further, the Third Report and Order did not become effective until it was published in the Federal Register on February 10, 2004, which was four days *after* the 471 filing window closed on February 6, 2004. Consequently, the District was confused over whether it should have submitted its minor contract modification to the SLD in support of this FRN when the application was submitted on February 4, 2004. In fact, the SLD's Guidance on the subject was not published until February 13, 2004, which was a week *after* the 471 filing window closed.

Most importantly, when the record is reviewed on the whole—as the FCC is required to do--including the minor contract modification and bill of sale, the District and Sunesys have shown that the funding request at issue was for an eligible lit fiber service, and not an ineligible dark fiber service.[2] There was a lot of confusion and the documentation procedures were unclear when the District filed its 471 application for FY 2003 as to what information should be submitted to substantiate that the request was for lit fiber service and not dark fiber service. During PIA review, the District did not understand that PIA was requesting any documentation regarding the minor contract modification for the service. The minor contract modification is consistent with the original Item 21 attachment which referred to Gigabit Ethernet Wide Area Network Service, and the FCC should approve this appeal.

Respectfully submitted,



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[2] In a similar situation involving a funding request for lit fiber service which the SLD mistakenly concluded was dark fiber, the FCC recently granted an appeal of the applicant. Houston Independent School District, File No. SLD-398831, DA 05-2834 (Order released October 27, 2005). The District and Service Provider urge the FCC to reach a similar outcome in this case.